BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TINA K. ELDRIDGE	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,361
CHAMP SERVICE LINE DIVISION	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from a preliminary hearing decision entered by Assistant Director Brad E. Avery. The Order, dated March 7, 1997, granted claimant's request for temporary total disability and medical benefits.

ISSUES

Respondent contends the Assistant Director exceeded his jurisdiction by granting benefits for a new accident on January 13, 1997, a date for which the currently named insurance carrier, Zurich American Insurance Company, did not insure the respondent. Respondent also contends there was no competent admissible evidence to support the decision that claimant needs additional treatment and the Assistant Director erred in relying upon the medical report not submitted to respondent prior to the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the Assistant Director should be affirmed.

Claimant initially filed this claim based upon a September 28, 1993, date of accident for repetitive injuries to her upper extremities. Claimant was off work for approximately a year and a half and was released to return to work on May 25, 1995. Vito J. Carabetta

recommended work restrictions in 1994. Bernard M. Abrams, M.D., released her without restrictions. The insurance carrier for the originally alleged date of accident was Zurich American. The respondent indicates Zuirch American ceased to be the insurance carrier as of January 1, 1996.

Claimant testified that after her return to work in 1995 she was assigned duties pulling ignition wires, a more repetitious work. Claimant also testified that her symptoms worsened, and she requested additional medical treatment. Respondent sent claimant to Dr. Carabetta in March of 1996. Dr. Carabetta concluded that her condition remained the same as when he last saw her and advised that she should maintain the same restrictions he recommended in 1994. In 1994, Dr. Carabetta had recommended she avoid overhead work and limit lifting to shoulder height to less than 15 pounds. He also recommended she avoid repetitive hand activities such as grasping. After seeing Dr. Carabetta, claimant went on her own to Stewart R. Grote, D.O. Dr. Grote concluded that claimant has a fibromyalgia related to trauma and repetitiveness of her work. He recommended continued treatment.

In answer to questions posed by her counsel on direct examination at the preliminary hearing, claimant testified to the symptoms she was experiencing. On cross-examination, respondent's counsel elicited testimony that her condition had become worse and she believed it had been made worse by her work after she returned in 1995. The Assistant Director found claimant had sustained additional injury after she returned to work in December of 1995 and continuing until January 1997. In the Order, the Assistant Director found the date of accident to be the last day claimant worked in January 1997, citing Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). He also ruled that the insurance carrier providing coverage at the time of the "last injurious exposure" would be liable for the benefits ordered, citing Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

Respondent contends the Order exceeds the jurisdiction of the Assistant Director because no claim had been formerly made for an accident in January 1997. Respondent changed insurance carriers, and the insurance carrier on the risk for an accident in January 1997 received no notice of any claim. For the reasons stated below, the Appeals Board concludes that the factors cited by respondent do not defeat the jurisdiction of the Assistant Director or nullify the Order.

Notice to the insurance carrier needs to be looked at separately from notice to the employer. The Act does not require the claimant to identify or notify the correct insurance carrier. As suggested by the Assistant Director, notice to the insurance carrier should be considered the responsibility of the respondent.

Claimant must, on the other hand, properly assert her claim against the employer. Claimant must satisfy the notice requirements of K.S.A. 44-520 and the written claim requirements of K.S.A. 44-520a. Claimant testified she repeatedly requested that her employer provide medical treatment. It seems clear respondent understood the medical treatment was being provided as a workers compensation benefit. Respondent did, in fact,

refer claimant to Dr. Carabetta. Respondent had notice claimant was claiming benefits for an on-the-job injury.

Respondent makes a compelling argument that claimant should be denied benefits because she made no separate written claim. The Board is, however, constrained by the decision of the Kansas Supreme Court in Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988). In that case, claimant originally alleged one date of accident and the evidence introduced at the hearings showed there had been a subsequent accident to the same area of the body. Claimant did not file a second claim or amend his original claim. The Supreme Court held that the failure to file a second claim or amend the original claim did not prevent the claimant from recovering for disability from of the second injury. The Court emphasized that an objective of the workers compensation law is to avoid the "cumbersome procedures and technicalities of pleadings, so that a correct decision may be reached by the shortest and quickest possible route." In that case, the respondent was aware of the second accident, and the Court concluded that there would be no prejudice to the employer.

Respondent argues that allowing claimant to proceed on the January 1997 date of accident would be like allowing a new claim for a broken leg to be added informally, without notice, to an old claim still open for finger injury. The Board considers the analogy distinguishable. Although the Supreme Court approved the award in Pyeatt, the Court also described the following limits:

> The claim Pyeatt initially filed did vary from his subsequent claim and the proof offered at the disability hearing. Such variance is fatal if the employer is required to defend against an award of compensation for an unknown injury. Under such circumstances, an employer would be prejudiced by the inability to have previously investigated the facts prior to the hearing to determine whether the injury was work-related.

The facts in Pyeatt arguably provide greater justification for the informal process than the facts here. In Pyeatt, the claimant had filed a report of a second accident. The respondent, in Pyeatt, defended the claim by attempting to establish that all of the disability resulted from the second accident which should be barred because there had been no formal claim filed. Here there is no indication claimant reported a second accident. On the other hand, respondent did know the history of the original injury and knew claimant believed she needed medical treatment for problems in the same area of the body. Neither claimant nor respondent was in a position to predict with certainty whether the Assistant Director would find claimant sustained a new accident or suffered from the natural and probable consequences of the original accident. Both parties were on essentially equal footing on that question. Under these circumstances the Board concludes respondent was not prejudiced in its ability to investigate and, under the Pyeatt rationale, the Assistant Director correctly allowed the claimant to proceed.

Respondent asserts another type of prejudice, arguing it could not notify the proper second insurance carrier without notice of the second date of accident. Although not

expressly decided by a Kansas appellate court, the Board concludes the insurance carrier is a proper party but not a necessary party in workers compensation proceedings. Judgment against the employer is binding on the insurance carrier even if it did not receive notice. *See*, Landes v. Smith, 189 Kan. 229, 368 P.2d 302 (1962). The award of benefits against the employer is, in our view, proper for the above-stated reason, and that award is binding on the insurance carrier with coverage on January 13, 1997.

The respondent next argues that the Assistant Director exceeded his jurisdiction when he considered the report of Dr. Grote, a report which had not been attached to the notice of intent or otherwise provided to the respondent prior to the preliminary hearing. The Appeals Board ruled on a similar contention in Sulaimon v. Woodland Health Center, Docket No. 192,021 (September 1995). There, as here, the respondent pointed to the provisions of K.S.A. 44-534a which requires that copies of medical reports and other evidence be attached to the request for preliminary hearing. In the Sulaimon decision, the Board held that the legislature had clearly intended to promote the exchange of documents and further concluded that the Administrative Law Judge would have the authority to enforce that intention by excluding such records from evidence if not exchanged. The Board, nevertheless, found that the decision to consider those records, at least where they were not available prior to the Application for Preliminary Hearing, did not exceed the jurisdiction of the Administrative Law Judge. It appears the report from Dr. Grote was not available at the time claimant filed her Application for Preliminary Hearing. The Appeals Board again finds that the Assistant Director did not exceed his jurisdiction. Whether the evidence then established a need for treatment is not a jurisdictional issue and is not subject to review by the Board.

WHEREFORE, the Appeals Board finds that the Order by Assistant Director Brad E. Avery, dated March 7, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Wade A. Dorothy, Lenexa, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director